LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 4 1972
E. ROBERT SEAVER, CLERK

No. 71-741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT E. MESSENGER, *Petitioner,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, and INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DE ROSA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

GEORGE KAUFMANN
1819 H Street, N. W.
Washington, D. C. 20006

ARTHUR J. FLAMM
FLAMM, MASON & PAVEN
7 Water Street
Boston, Mass. 02109

Attorneys for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-741

ROBERT E. MESSENGER, *Petitioner*,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, and INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DE ROSA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

ARGUMENT

The District Court's order granting summary judgment against petitioner was unanimously affirmed by the Court of Appeals, which declared his appeal to be "totally without merit." (Pet.[1] p. 2a). This

[1] "Pet." refers to the Petition for Certiorari. "Record" refers to the "Appendix to Brief of Petitioner-Appellant" in the Court of Appeals.

characterization is entirely justified and applies *a fortiori* to petitioner's effort to obtain a second round of appellate review. The holding below that petitioner had failed to demonstrate any infirmity in the union's internal proceeding is wholly consistent with *Boilermakers* v. *Hardeman*, 401 U.S. 123, and presents no question of general importance warranting this Court's consideration.

1. Petitioner alleges that his rights under § 101(a)(5)(A) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 523, 29 U.S.C. § 411(a)(5) (hereafter LMRDA) were denied because the charge against him did not specify the precise clause of the provision of the union constitution on which the charge was based.

The Court of Appeals properly rejected this contention:

> "The charge was made by a fellow member, by letter. It referred, by number, to a certain catchall provision in the constitution. Plaintiff complains that this provision listed 13 types of general offenses, and that the charge did not, in terms, state which one was relied on. This is true. However, the letter asserted the basic facts upon which the accusation depended. It is an erroneous legalism for plaintiff to say that he received no notice of the "charge brought against me". It was not necessary to specify into which particular clause in the section the conduct fitted. All that plaintiff was entitled to was adequate notice as to what, factually, he must defend against. *Boilermakers* v. *Hardeman*, 1971, 401 U.S. 233. This he received. Beyond this we have "no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all. Id. at 245." (Pet. p. 2a).

This reasoning correctly applies *Boilermakers*, which held that the right to notice guaranteed by § 101(a)(5) is one of fundamental fairness rather than of technical nicety. As Petitioner appears to acknowledge (Pet. p. 13), *Boilermakers* itself recognized that no constitutional provision need be cited at all in the charge.[2] Nevertheless he paradoxically insists that his rights were violated because, although the constitutional provision *was* cited, the charge was not made even more explicit. While Petitioner now asserts that "this is the kind of thing which would 'mislead or otherwise prejudice'" the union members' defense (Pet. p. 13), in his affidavit in opposition to the motion for summary judgment he did not even assert that he was misled. See p. 4, n. 3, *infra*. He simply chose to rest on what the Court of Appeals aptly described as the "erroneous legalism" that a charge was invalid if it failed to make explicit the particular clause of the union constitution. The rejection of that tactic raises no issue of sufficient significance to warrant this Court's consideration.

2. Petitioner charges that the courts below "*completely overlooked* the holding of [*Boilermakers*] with respect to the question of the sufficiency of the evi-

---

[2] This is implicit both in the Court's holding that the charge need not be based on any constitutional provision at all (401 U.S. at 244) and the statement "[*w*]*here, as here*, the union's charges make reference to specific written provisions, § 101(a)(5)(A) obviously empowers the federal courts to examine those provisions and determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense." *Id.* at 245 (emphasis supplied). Thus, while the charge need not specify any constitutional provision, if it does so the member would be entitled to relief under § 101(a)(5)(A) if he were misled or otherwise prejudiced by being convicted under a different provision.

dence." (Pet. pp. 13-14, emphasis in original). But the fault is in Petitioner, not in the courts below. Neither in his complaint nor in his affidavit pursuant to F.R.Civ.P. 56(e) opposing summary judgment did petitioner assert that he was entitled to relief on the ground that no evidence had been introduced against him in support of the charges. His only "due process" objection under §101(a)(5), was the failure of the charge to specify the exact clause of the constitutional provision relied upon.[3] The Court of Appeals was obviously correct in refusing to set aside the summary judgment on a ground which was not based on "specific facts" set forth in Petitioner's opposing affidavit. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-290.

3. Finally, Petitioner objects to the union's refusal to accept his tender of the fine by a check marked "Payment under Protest." The Court of Appeals

---

[3] With respect to the trial, the affidavit in support of the motion for summary judgment asserted as follows:

> "The trial was held in accordance with said notice and the provisions of the International Constitution. The charging party testified, and the Plaintiff was offered an opportunity to testify, but he chose not to respond to the charges. The vote of the body was 161 'guilty', 22 'not guilty', and 5 blanks. A fine of $500.00 was imposed upon the Plaintiff. On June 26, 1967, notice thereof was sent to the Plaintiff, a copy of which is attached hereto and marked Exhibit E." (Record, p. 5a.)

In his opposing affidavit Petitioner responded as follows:

> "Answering paragraph 4 of said Walter J. Ryan's affidavit, I deny that 'I chose not to respond to the charges' at the trial. At the trial I attempted to ascertain what specific offense I was being charged with, and I received no reply other than the reference to the aforementioned section of the constitution." (Record, p. 28a.)

ruled that defendants "had a right to" refuse that tender (Pet. p. 1a). Petitioner cites no provision of the LMRDA or any other federal law to the contrary. Moreover, Petitioner conveniently overlooks the Court of Appeals' determination that:

> "* * * as a separate matter, this tender was long after the six months grace that, as plaintiff had been told, the union constitution afforded for unconditional receipt of fines, viz., without an application for reinstatement into the union." (Pet. p. 1a):

Petitioner now asserts that the purpose of the refusals was to harass him (Pet. pp. 9, 10-11), but he does not explain how this would raise a federal question. In any event, Petitioner's affidavit in opposition to the motion for summary judgment (Record pp. 27a-29a) asserted no "specific facts" in support of such a charge. On the contrary, it left uncontradicted the assertion in respondent's affidavit that because of Petitioner's tardiness "there was no alternative for Local 4 but to comply with the Constitution and expel him from membership." (Record p. 7a).[4]

---

[4] Paragraph 7 of the affidavit filed in support of respondents' motion for summary judgment states:

> "The Plaintiff refused to comply with [the provisions of the Constitution dealing with payment of fines]; and after being more than six months in arrears, there was no alternative for Local 4 but to comply with the Constitution and expel him from membership." (Record, p. 7a.)

Petitioner's sole response to Par. 7 was "I do not deny that the provisions of the union's constitution are correct, as stated." (*Id.* p. 28a).

CONCLUSION

By reason of the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

GEORGE KAUFMANN
1819 H Street, N. W.
Washington, D. C. 20006

ARTHUR J. FLAMM
FLAMM, MASON & PAVEN
7 Water Street
Boston, Mass. 02109

Attorneys for Respondents